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No. 06-243

Supreme Court, U.S.
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In The
Supreme Court of the United States

WASHINGTON SAVANNAH RIVER COMPANY,

Petitioner,

v.

STEPHEN D. HOLLINGSWORTH,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Was the Pennsylvania state court correct in concluding that it had jurisdiction over Petitioner Westinghouse Savannah River Company ("WSRC")[1], where (1) WSRC's parent company – Westinghouse Electric Corporation ("WEC") – was always headquartered in Pennsylvania and had many operations and employees there, (2) WSRC was a wholly owned subsidiary of WEC (with the two companies being so interrelated that they were alter egos of one another), (3) where WSRC and WEC acted together in convincing Respondent Hollingsworth and many other Pennsylvania-based residents to transfer to WSRC facilities in South Carolina, and (4) where the promises made regarding the transfer gave rise to Hollingsworth's cause of action in the Pennsylvania court?

[1] Seven months ago (in December 2005), WSRC changed its name from Westinghouse Savannah River Company to Washington Savannah River Company.

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 1999, Respondent Stephen D. Hollingsworth ("Hollingsworth") filed his complaint against Petitioner Westinghouse Savannah River Company ("WSRC") alleging that he had earned retirement benefits in exchange for years of service in connection with nuclear energy operations first owned by Westinghouse Electric Corporation ("WEC"), and later by WSRC – a wholly owned WEC subsidiary. Hollingsworth further alleged that, in order to induce him to transfer from WEC to WSRC, he was promised that he would not lose any pension benefits. In fact, WSRC established an informal pension plan to pay for any loss or difference in pension benefits he might suffer as a result of the transfer – the loss or difference being referred to as the "Delta." However, when Delta pension benefits were due and owing, WSRC refused to award them to Hollingsworth. In denying benefits, WSRC claimed that one "condition" of receiving them was that the retiree must have retired *directly* from WSRC at retirement age. So any person laid off or otherwise leaving WSRC prior to retirement age was deemed to be ineligible – even if that person had decades of service, received pensions from WEC and WSRC, and received a substantially inferior combined pension than he or she would have received had there been no transfer to WSRC.

After an extensive trial, Judge Judith Friedman of the Pennsylvania state court found that this alleged "condition" was never part of the agreement to pay Delta benefits, that WSRC's refusal to pay Delta benefits clearly violated the agreement, and that – indeed – WSRC acted in bad faith in later concocting the "condition." The intermediate appellate court in Pennsylvania unanimously

affirmed in an unpublished decision, and the Pennsylvania Supreme Court denied review on May 18, 2006.

In its Petition for Writ of Certiorari ("Pet."), WSRC now seeks to have this Court review the state court decisions. WSRC contends that it lacked the requisite contacts with Pennsylvania for the courts there to have asserted jurisdiction over it. This Court should deny the Petition. As the appellate court in Pennsylvania found, "(1) WSRC purposefully directed business activities toward residents of Pennsylvania and could reasonably anticipate being haled into court here; and (2) the nature and quality of WSRC's contacts with Pennsylvania were such as to 'make it reasonable and fair' to require WSRC to conduct its defense of Hollingsworth's Complaint in Pennsylvania." Pet. A-14 to A-15.

COUNTER-STATEMENT OF THE CASE

A. Hollingsworth's Work History Through 1989, And WEC's Creation Of WSRC As Its Wholly Owned Subsidiary.

From August 15, 1973 to August 1, 1989, Hollingsworth was an employee of Westinghouse Electric Company ("WEC"), *a Pennsylvania corporation with headquarters in Western Pennsylvania*. Reproduced Record on appeal below ("RR") 563a-564a, and 159a; Pet. A-1, A-11. WEC first employed Hollingsworth as a Nuclear Engineer to design reactor protection systems and to perform computer simulations of reactor plants under accident conditions. WEC later placed him in charge of licensing technologies to other countries. RR 563a-564a, and 159a.

In 1988, the Department of Energy (hereinafter referred to as "DOE") sought new management for its Savannah River site, a 200-square-mile South Carolina manufacturing facility built in the early 1950s to generate plutonium and tritium for nuclear weapons. RR 570a-571a. WEC sought to manage the site, and an important reason behind its decision to seek the contract was to keep its nuclear reactor design and construction personnel intact. It did not want to lose these valuable Pennsylvania-based personnel to other firms during this period of decreased demand for services related to the nuclear reactor industry. RR 160a, Pet. E-5. WEC successfully bid, and assumed management of the site from DuPont in 1989. *Id.*, and RR 572a-573a. The entity WEC created to perform under the contract was a subsidiary known as Westinghouse Savannah River Company ("WSRC"). WSRC was *wholly* owned by WEC until it was divested at the end of March 1999 (RR 106a, ¶ 4, Pet. E-4) – which was just months before Hollingsworth filed his lawsuit and *after* all the pertinent misconduct directed against Hollingsworth had already taken place.

In the proceedings below, in countering WSRC's argument that it had insufficient contacts with Pennsylvania to be sued there, Stephen Hollingsworth filed a sixteen-page sworn affidavit, to which he attached thirty-seven (37) exhibits. This evidence shows a direct and substantial relationship between WEC and WSRC, between WSRC and Western Pennsylvania, and between the breach of promise at issue and Western Pennsylvania. Just a few of the highlights of the affidavit and exhibits are the following:

- A staff of approximately 20 WEC employees was established at Waltz Mill and the Energy

Center (both of which were WEC facilities in Western Pennsylvania) to bid the contract for the Savannah River project. RR 170a ¶ 43. Ambrose Schwallie, a WEC manager, was responsible for bid preparation. He maintained offices and used personnel at WEC's Waltz Mill facility. Two individuals, Mr. Moore and Mr. Gallagher, who were located at WEC's Monroeville Energy Center in Pennsylvania, assisted in the bid and became, along with Schwallie, part of WSRC's management team. RR 73a-74a. (Years later, Moore and Gallagher transferred back to WEC.)

- Many WEC employees from the Pittsburgh, Pennsylvania, area were ultimately transferred to manage the Savannah River Plant, and WEC felt that it benefited by staffing WSRC with these highly skilled personnel. RR 169a. RR 75a-76a. In the end, management for the WSRC site was taken almost entirely from the management ranks at WEC in Pittsburgh. See examples at RR 169a ¶¶ 13-19; RR 184a-185a. So connected to Pittsburgh were these transferees that many kept season tickets for the Steelers and even rigged a satellite receiver to view Steeler games in South Carolina. RR 170a ¶¶ 52 and 51.

- The profits from WSRC flowed to the WEC balance sheet, and WSRC received management guidance and directives from WEC. RR 168a-169a, ¶¶ 2-3, and Ex.36.

- WEC senior managers served on WSRC's board of directors. RR 169a ¶ 8.

- WSRC employees participated in WEC programs such as the employee stock purchase plan that provided the opportunity for WSRC employees to purchase WEC stock at a discounted value.

- WEC management in Pittsburgh set financial and non-financial objectives of WSRC. RR 170a ¶ 28; RR 309a-314a.

- Service at WEC counted towards a WSRC pension and vice versa. WSRC employees received WEC service awards. RR 170a ¶¶ 30-31.

- WSRC employees attended courses in Pittsburgh and elsewhere – courses that WEC had established. RR 170a ¶ 32.

- WSRC and WEC Human Resources Departments actively communicated to facilitate Hollingsworth's transfer back to the Energy Center at WEC (discussed below). RR 170a ¶ 34; RR 248a-267a.

- Former WEC employees whose jobs were eliminated during the WSRC downsizing had their resumes circulated throughout the Westinghouse Electric Corporation companies to aid them in the search for other jobs. RR 170a ¶ 39.

- As discussed below, Hollingsworth was for a time during 1995 on "loan" from WSRC to WEC in the form of an "interworks requisition" ("IWR"), an internal WEC procedure. RR 86a-87a. The loan was for the purpose of permitting Hollingsworth to work on a five-billion dollar WEC project related to a Taiwan Nuclear power plant. RR 88a. An IWR could only be used to transfer employees from one WEC department to another, not between separate corporations. RR 88a-89a. WSRC paid for Mr. Hollingsworth's salary during his 1985 IWR with WEC. RR 91a.

See also discussion of these facts by Pennsylvania Superior Court, pp. A-11 to A-13 of Petition.

B. Hollingsworth Is Induced To Transfer To WSRC.

Starting in 1988, WEC encouraged numerous WEC employees to transfer to WSRC. Knowing that the employees were concerned whether the transfer would cause them to lose valuable retirement benefits, WEC promised that employees who transferred to WSRC would not suffer a loss in such benefits. Thus, WEC (and WSRC) represented that, if employees accepted transfers, the money paid to them in retirement would be no less than the amount paid if they were to continue to work for WEC. RR 163a ¶¶ 62-65; RR 576a lines 5-15. These promises and representations were subsequently confirmed by WEC's and WSRC's course of conduct (as discussed below). During 1989, over four hundred (400) WEC engineers, scientists and managers, transferred to the Savannah River site. RR 161a ¶¶ 27-28. As noted, they worked for the newly formed and wholly owned subsidiary, WSRC. *Id.*

The offer to Hollingsworth was formally made on June 23, 1989, and he accepted the offer and transferred on August 1, 1989. RR 16263a ¶¶ 55, 58. Hollingsworth's education, his experience training naval officers and enlisted men in the design and operation of nuclear propulsion plants, and his experience in design and analysis of commercial nuclear plants, ideally suited him for a position at WSRC. RR 162a ¶ 45. WEC characterized Hollingsworth's acceptance of a position with WSRC as an "internal transfer". RR 163a ¶¶ 59-60. Prior to WSRC's offer and transfer of Hollingsworth, WEC represented to Hollingsworth (as it had to the other transferees) that – upon retiring – his pension benefits at WSRC would be the same as if he had retired from WEC. RR 163a ¶¶ 62-65; RR 576a lines 5-15. This representation led Hollingsworth to accept, even though it was a hardship for him to leave

behind in Pennsylvania his wife and high school age son. RR 574a-575a.

An employment consultant had informed Hollingsworth that he could have commanded more money outside WEC; but he wanted the pension benefits provided by continued WEC employment. RR 162a ¶¶ 50-53.

Shortly after Hollingsworth's transfer on August 1, 1989, Michelle Trill of WSRC represented to Hollingsworth that the benefits package that WSRC had negotiated with DOE was in all cases equal to or better than the benefits package enjoyed by WEC employees. RR 163a ¶¶ 65 and 58, 579a.

C. Establishment Of The Delta Plan And Representations To Hollingsworth And Others.

During 1992, WEC and WSRC disclosed to Hollingsworth and other transferred employees that, due to an oversight, WSRC pensions would be less than the pensions that they and the other transferred employees would have received had they remained at WEC. RR 582a-585a, and Hollingsworth Deposition, page 26, lines 17-20, page 27, lines 16-18. The shortfall or difference between the two pensions was termed the pension "Delta." RR 164a ¶ 77. WSRC acknowledged in a memo: "Many of these employees would have not transferred had they known the problem, which would have been a loss for both of us." RR 585a. During 1992 and 1993, WSRC and its consultants (Buck Consulting from Pittsburgh) studied the problem extensively (e.g., RR 586a-605a). WSRC ultimately assured Hollingsworth and the other transferees that the WSRC pension "Delta" problem would be corrected, and that Hollingsworth and the others would indeed receive

the same pensions that they would have received had they continued to work directly for WEC. These representations were most emphatically communicated to transferred employees in an Inter-Office Memorandum dated June 28, 1993, from Paul W. Matthews (hereinafter "Matthews Memorandum"), who held the title of Manager of WSRC's Employee Benefits and Systems. RR 163a-164a, ¶¶ 66 and 77.

Under the Matthews Memorandum, transferred employees (such as Hollingsworth) were guaranteed to receive the pension shortfall or Delta, and a detailed example specified how the Delta would be calculated. RR 1100a-1101a; Pet. E-7 to E-8. The Matthews Memorandum specified that Delta benefits would be paid to those employees transferring to WSRC through June 1991, so long as the size of "Delta" was at least $25.00 per month. RR 1101a.

When it issued the Matthews Memorandum, WSRC never told employees or others that it should be interpreted as imposing a very restrictive condition on receipt of Delta benefits, namely, that the employee would have to retire *directly* from WSRC to be eligible. RR 611a-612a; RR 627a-629a. Indeed, upon reading it, Hollingsworth himself did not view it as imposing such a condition, and he considered it irrelevant whether or not he remained an active WSRC employee right up until retirement. RR 625a.

D. Hollingsworth's Transfer Back to Pennsylvania.

In May 1995, WEC requested that WSRC transfer Hollingsworth on an "Inter Works Requisition" ("IWR") *back to Pennsylvania*, so that he could work with WEC's Industries and Technologies Group. The transfer was

granted. RR 165a ¶¶ 92-94; Pet. E-9. For Hollingsworth, this became a permanent assignment as of August 25, 1995. RR 639a-645a; RR 166a ¶¶ 98-99.

At the time of his transfer back to WEC, WSRC did not inform Hollingsworth that the IWR or the subsequent permanent employment by WEC would cause him to become ineligible for the Delta benefits. Indeed, at the time, Mr. Matthews himself advised Hollingsworth that his transfer "would not have any impact on" Hollingsworth's Delta entitlement. RR 646a-648a; RR 677a-678a; RR 166a ¶ 97.

E. Hollingsworth's Retirement, WSRC's Confusing And Conflicting Determinations Concerning Honoring The Promise To Pay Hollingsworth The "Delta" Benefits, And The Ultimate Denial Of Benefits In September 1999.

WEC's Industries and Technologies Group, where Hollingsworth worked during the second half of 1995, offered an Immediate Special Retirement Pension as part of a major downsizing of personnel in the fall of 1996. RR 166a ¶ 101, and 652a-653a. On November 30, 1996, Hollingsworth retired from WEC as part of this downsizing, and he began drawing WEC pension benefits. RR 167a ¶ 111, and 652a-653a; Pet. E-9.

At that same time, Hollingsworth was also entitled to "retire" from WSRC, and he therefore requested payment of WSRC pension benefits. RR 654a-658a, 673a-674a. In response to the request, WSRC calculated the value of Hollingsworth's pension benefits, *including the Delta* (which Hollingsworth believed to be applicable since he was "retiring" and his combined WEC and WSRC benefits

were less than his benefits would have been had he never transferred to WSRC). *Id.* By letter dated January 24, 1997, Harry L. Fuller, of WSRC, provided a detailed description of Hollingsworth's pension benefits, including a Delta payment of $609.00 per month. RR 658a-659a, and 167a.

Hollingsworth later contacted Mr. Fuller and also Buck Consultants of Pittsburgh (who worked for WSRC) to protest the calculation of the Delta amount, informing both that it should be increased by $60.00 per month. RR 663a, and RR 167a; Pet. E-10.

Hollingsworth's inquiry led WSRC to re-evaluate the determination, and then to conclude that he should be paid *no Delta whatsoever*. Pet. E-10. The basis for the denial of benefits was WSRC's belated assertion that one "condition" for receiving Delta benefits was that the employee had to retire directly from WRSC, and not WEC. RR 666a. Never before had anyone from WSRC made this assertion. *Id.*, and RR 676a.

Hollingsworth later sent various letters of protest, and after much delay, his claim for the Delta benefits was finally denied in September 1999, and he has never been paid these benefits.

F. Procedural History.

On November 16, 1999, two months after the final denial, Hollingsworth filed his lawsuit against WSRC and WEC, setting forth causes of action that included breach of contract to provide pension benefits. RR 11a-15a. WSRC sought dismissal or transfer, arguing that the Court lacked jurisdiction over WSRC, allegedly because of

WSRC's limited contacts with Pennsylvania. RR 18a. Hollingsworth responded to the jurisdictional argument, demonstrating that WSRC was a wholly owned and controlled subsidiary of WEC (a Pennsylvania corporation), that WSRC had extensive and continuing contacts with Pennsylvania, and that the subject matter of this case arose from acts which occurred in Pennsylvania. RR 143a-172a. Agreeing with Hollingsworth, Judge Lutty of the Court of Common Pleas in Pittsburgh found that the Pennsylvania court had jurisdiction to hear the dispute. Pet. D-1 to D-2.

In July 2001, WEC and WSRC filed motions for summary judgment, arguing, *inter alia*, that Hollingsworth was really seeking benefits under a "plan" maintained pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, et seq., and that his claims were therefore preempted by ERISA.[2] RR 362a-363a.

In response to WSRC's argument that the action was really an ERISA action, Hollingsworth contended that WSRC had never met the formal requirements for establishing and maintaining an ERISA plan, and that if the pension Delta were in fact such Plan, then WSRC had committed flagrant violations of many of ERISA's reporting and disclosure requirements. RR 398a-400a. WSRC responded that it did not need to comply with these laws in order to win a preemption argument: it said a non-compliant, illegal plan

[2] WEC also moved to dismiss itself contending that *WSRC* as ERISA plan sponsor (and not WEC) was responsible for obligations under the Delta Plan. The Court did ultimately dismiss WEC from the suit, but did not provide any reasoning for its dismissal order. RR 425a.

is still an ERISA plan affording the defendant the protection of preemption.

As an alternative argument in opposing the motion, Hollingsworth contended that the case should be *treated* as an ERISA claim, as state courts have concurrent jurisdiction over claims for benefits under ERISA plans. RR 406a-407a. This argument was based on statutory language and precedent holding that, if a program that is the subject of a state lawsuit is in fact an ERISA plan, then the state court judge should still try the matter as a claim for "plan benefits" brought under 29 U.S.C. § 1132(a)(1)(B). This is because state courts have concurrent jurisdiction to hear such claims. 29 U.S.C. § 1132(e)(1). Where such state claims are "treated" as ERISA claims, the court has authority to award full benefits to plaintiff.

On February 15, 2002, while finding that all state law claims were preempted by ERISA (thus granting part of WSRC's motion), state court Judge Lucchino agreed with Hollingsworth's alternative argument, finding that his lawsuit – since it sought pension benefits – stated a claim under ERISA, 29 U.S.C. § 1132(a)(1)(B). Thus, Judge Lucchino declared that "this action shall proceed as a claim under ERISA against [WSRC] by virtue of this Court's jurisdiction under 29 U.S.C. § 1132(a)(1)(B) and 1132(e)(1)." RR 425a-426a.[3]

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[3] Later, in clarifying his decision, Judge Lucchino stated: "[W]hen a pleading states a claim that is completely preempted (such as the type of ERISA claim at issue in this case), it matters not whether the federal action is pled on 'the face of the complaint': a potential federal cause of action exists" (RR 1829a); and "this Court decided that ERISA preemption applied to Plaintiff's claims and that Plaintiff's complaint,

(Continued on following page)

The case was then assigned to yet another judge – Judge Friedman – who agreed that the complaint should be treated as an ERISA claim from its inception, and who allowed the case to proceed to trial as an ERISA action for pension benefits. Judge Friedman heard two days of testimony, observing the demeanor of multiple witnesses and scrutinizing both testimonial and documentary evidence. On June 17, 2003, Judge Friedman issued her Memorandum in Support of Verdict. On the merits, she found that the Matthews Memorandum, the primary document governing the terms of the Delta Plan, did not contain the alleged "condition" that WSRC said made Hollingsworth ineligible: there was no requirement that he retire *directly* from WSRC. Later, on April 26, 2004, Judge Friedman issued a supplemental 41-page opinion, reiterating that certain key WSRC witnesses (e.g., Matthews) were "not credible" (e.g., Pet. E-17), and noting that WSRC's "fingers were undoubtedly crossed" (Pet. E-19), and that WSRC had acted in "bad faith" (Pet. E-33) and

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although it did not refer to ERISA, pled sufficient facts to state a claim under ERISA" (RR 1830a), and "Plaintiff pled (even if unintentionally) sufficient facts to state a claim under ERISA in his original complaint." RR 1831a.

In the meantime, even before Judge Lucchino had issued his decision ordering the case to trial as an ERISA claim, WSRC tried another maneuver: It removed the entire proceeding to federal court even though federal law requires such removal within 30 days of the filing of the complaint (28 U.S.C. § 1441), and even though WSRC had waited over two years to remove. In federal court, WSRC said it did not really "know" Hollingsworth was bringing an ERISA claim until Hollingsworth made the alternative argument in opposing summary judgment in late 2001. Judge D. Brooks Smith, then Chief Judge in federal court (and now sitting on Third Circuit Court of Appeals), rejected this argument, and remanded the case to state court. RR 1830a-1831a.

shown "indifference" to the rights of Hollingsworth and other transferees (Pet. E-36). Carefully examining the record, she again rejected WSRC's "tortured reading" of the Matthews Memorandum as "contrary to English grammar and to its own usage at the time the promise was made." Pet. E-19.

The intermediate appellate court in Pennsylvania unanimously affirmed in an unpublished decision (Pet. A-1), and the Pennsylvania Supreme Court exercised its discretion to deny review without decision on May 18, 2006. Pet. F-1.

REASONS FOR DENYING REVIEW

A. The Pennsylvania Courts Correctly Asserted Jurisdiction.

Pennsylvania courts may exercise two types of personal jurisdiction over a non-resident corporate defendant: 1) specific jurisdiction, based upon the specific acts of the defendant giving rise to the cause of action (42 Pa. Cons. Stat. § 5322(a)); or 2) general jurisdiction, based upon the defendant's general activity within the Commonwealth. See 42 Pa. Cons. Stat. § 5322(b); *Kubik v. Letteri*, 532 Pa.10, 16-17, 614 A.2d 1110, 1113-14 (1992).

One special application of these principles is that a Pennsylvania court may assert personal jurisdiction over a *non-resident* corporation (such as WSRC) if plaintiff shows that the defendant is the "alter ego" of a *Pennsylvania* corporation (such as WEC). See *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 72, 213 A.2d 349, 354 (1965) (concluding subsidiary is "alter ego" of parent since domination and control by parent corporation renders

subsidiary a mere instrumentality of parent); see also *Williams v. Rose*, 170 A.2d 577, 403 Pa. 619 (1961) (Delaware corporation was found to be "doing business" in Pennsylvania so as to be amenable to service in Pennsylvania, where Delaware corporation owned all stock of Pennsylvania corporation, which had done business in Pennsylvania until it moved out, and corporations formed one conglomerate, with Pennsylvania corporation alter ego of Delaware corporation); *United Steelworkers of America v. Copperweld Steel Co.*, 230 F. Supp. 383 (W.D. Pa.1964).

Judge Lutty applied this rule in this case. After reviewing the parties' briefs, hearing oral argument, and considering relevant case law, he found that WSRC was an "alter ego" of WEC, and that jurisdiction over WSRC was properly asserted. Pet. D-2.

The ruling is correct, as there was substantial evidence that WSRC was an "instrumentality" or mere "alter ego" of WEC. In particular, Hollingsworth compiled a list of fifty-two (52) direct connections between WSRC and WEC, clearly demonstrating not only that WSRC maintained significant contacts with Pennsylvania but that WEC completely dominated and controlled WSRC for its own benefit. Among them was the fact that WSRC obtained almost all of its essential employees through transfers from WEC's facilities in Pittsburgh, and that WEC benefited from the creation and staffing of WSRC by keeping its top nuclear experts from seeking employment with companies that were not under its control.

Many of these same facts show that, even apart from the "alter ego" issue, Judge Lutty's assumption of jurisdiction can be upheld on other grounds. In other words, even if WSRC was *not* an "alter ego" of WEC, specific *activities*

it performed which gave rise to the cause of action (e.g., its inducement of Pennsylvania employees to transfer, its representations concerning pensions, and it reneging on its promise just because Hollingsworth had returned to Pennsylvania to work with WEC at the end of his career) justified the Court below assuming jurisdiction. 42 Pa. Cons. Stat. § 5322(a) (listing examples of such activities, such as "(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth. (2) Contracting to supply services or things in this Commonwealth. (3) Causing harm or tortious injury by an act or omission in this Commonwealth. (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth."). *E.g., Skinner v. Flymo, Inc.*, 351 Pa.Super. 234, 239, 505 A.2d 616, 619 (1986) (jurisdiction proper if plaintiff's cause of action "arise[s] out of the defendant's *activities* within the Commonwealth . . . ").

Judge Lutty's ruling did not violate the Fourteenth Amendment of the U.S. Constitution (as WSRC now contends). Indeed, the ruling can even be upheld on the alternative grounds that WSRC had sufficient "minimum contacts" with Pennsylvania to make the exercise of jurisdiction permissible under the U.S. Constitution: "Jurisdiction of the Pennsylvania courts may be exercised with respect to all persons, including corporations, 'to the fullest extent allowed under the Constitution of the United States.' 42 Pa.C.S. § 5322(b)." *Slota v. Moorings, Ltd.*, 343 Pa. Super. 96, 101, 494 A.2d 1, 3 (1985). As a Pennsylvania appellate court aptly noted (citing many decisions of the U.S. Supreme Court):

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463 [61 S.Ct. 339, 342, 85 L.Ed. 278 (1940)].'" *Calder v. Jones*, 465 U.S. 783, 787, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804, 810 (1984) quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Consistent with this principle "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528, 542, (1985). Furthermore, as to contractual obligations, "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at 473, 105 S.Ct. at 2182, 85 L.Ed.2d at 540, quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950). See also *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223, 78 S.Ct. 199, 200-201, 2 L.Ed.2d 223 (1957).

Critical to due process analysis "is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490, 501

(1980). Indeed, even a single act can support jurisdiction. *McGee v. International Life Insurance Co., supra*, 355 U.S. at 223, 78 S.Ct. at 201, 2 L.Ed.2d at 223.

* * *

With these principles in mind, the facts of the instant case must be examined. The trial court found that "the only evidence of defendant's business conduct in Pennsylvania were some incidental phone calls made by Mr. Menin while he was in Montgomery County on unrelated business". (Trial Court Opinion at 4). The trial court also indicated, "(d)efendant certainly took no action by which it purposefully availed itself of the benefits and protections of Pennsylvania law; defendant's activities within the state being incidental at best." (Trial Court Opinion at 4-5). This reasoning overlooks substantial record evidence which as previously stated must be viewed in the light most favorable to Eastern.

The complaint as noted seeks recovery for various materials and services specified in a series of invoices. This is not a situation wherein a plaintiff is seeking to establish jurisdiction on the basis of a defendant's "random", "fortuitous", or "attenuated" contacts. See *Burger King Corporation v. Rudzewicz, supra*, 471 U.S. at 475, 105 S.Ct. at 2183, 85 L.Ed.2d at 541; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790, 797 (1984); *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 299, 100 S.Ct. at 568, 62 L.Ed.2d at 502. This is a suit alleged to arise out of and relate to the defendant's contacts within the Commonwealth. Island [the foreign corporation] is alleged to have deliberately reached out beyond the Virgin

> Islands and negotiated with a Pennsylvania Corporation for the purchase of various materials and services. Refusal to make the contractually required payments in the Commonwealth caused forseeable injuries to [plaintiff] Eastern which at least makes it presumptively reasonable for Island to be called to account in the Commonwealth of Pennsylvania for such injuries. See *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at 480, 105 S.Ct. at 2186, 85 L.Ed.2d at 545.

Eastern Continuous Forms v. Island Business Forms, 355 Pa. Super. 352, 355-57, 513 A. 2d 466, 468-69 (1986).

Here, as shown by the recitation of facts above, WSRC's had certain "minimum contacts" with Pennsylvania such that allowing the suit to proceed "does not offend 'traditional notions of fair play and substantial justice.'" *Id.* Given its inducement of 400 Pennsylvanians to move to South Carolina, and its promise to integrate pensions with those of its Pennsylvania parent, it clearly "reach[ed] out beyond one state and create[d] continuing relationships and obligations with citizens of another state," making it "subject to regulation and sanctions in the other State for the consequences of [its] activities." *Eastern Continuous*, 355 Pa. Super. at 355-57, citing *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at 473, 105 S.Ct. at 2182, 85 L.Ed.2d at 540, quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950). See also *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223, 78 S.Ct. 199, 200-201, 2 L.Ed.2d 223 (1957).

Accordingly, the appellate court below correctly concluded:

> (1) WSRC purposefully directed business activities toward residents of Pennsylvania and could reasonably anticipate being haled into court here; and (2) the nature and quality of WSRC's contacts with Pennsylvania were such as to 'make it reasonable and fair' to require WSRC to conduct its defense of Hollingsworth's Complaint in Pennsylvania.

Pet. A-14 to A-15. This passage shows, that contrary to WSRC's suggestion at p. 11 of its Petition, the state appellate court *did* find record evidence to support "specific" personal jurisdiction, and not simply "general" jurisdiction: It was WSRC's "purposeful" business activities directed to Pennsylvania residents (e.g., its recruiting practices) that made it reasonable to anticipate that it could be "haled into court" in Pennsylvania. Moreover, WSRC's connection with Buck Consultants of Pittsburgh further shows the necessary nexus to justify asserting jurisdiction, since (1) Buck was a fiduciary, (2) Buck was under direct contract with WSRC regarding this very pension issue, and (3) Buck did its work and calculations in this case in Pittsburgh. These are among the facts that established personal jurisdiction over WSRC independently of WEC and without resorting to "minimum contacts" analysis.

Even apart from its specific "purposeful" activities that serve as a basis of jurisdiction, WSRC's relationship with WEC – its Pennsylvania parent corporation – does in fact justify the lower court decisions. WSRC cites several cases for the proposition that "distinct corporate identities" should be respected, and that the "presence of one in the forum state may not be attributed to the other." Pet. E-12 to E-16, citing *Cannon Manufacturing v. Cudahy Packing*, 267 U.S. 333, 335-36 (1925), *Mylan*

Laboratories v. Akzo, 2 F.3d 56, 62 (4th Cir. 1993), *DeCastro v. Sanfill, Inc.*, 198 F.3d 282, 285 (1st Cir. 1999), and *United States v. Bestfoods, Inc.*, 524 U.S. 51, 61 (1998). However, these cases are all distinguishable. There was ample evidence here that WEC dominated and controlled WSRC, and that it was an alter ego of WEC. See facts set forth at pp. 3 to 5 above and Pet. A-11 to A-13. None of the cases that WSRC cites involved evidence in which parent and subsidiary were as intertwined as WEC and WSRC. In any event, the Pennsylvania courts – after considering the documentary and testimonial evidence – found the two companies to be sufficiently intertwined; these findings of fact are not clearly erroneous; and such fact-intensive legal proceedings are not the type that warrant review by this Court through a petition for writ of certiorari.[4]

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[4] Pennsylvania's intermediate appellate court – and not its highest court – issued the decision below. This fact – as well as the fact that the decision was unpublished – weigh in favor of denying the Petition. Supreme Court Rule 10(b) provides that a reason to grant a petition for writ of certiorari is that a state court *of last resort* has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals. Disfavoring review of decisions by state *intermediate* appellate courts makes sense, since such decisions are less likely to be considered outside of the jurisdiction, and they can also be corrected later by the state court of last resort.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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